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No. 98-472

In The

Supreme Court of the United States

October Term, 1998

GREATER NEW ORLEANS
EXPRESSWAY COMMISSION,
DAVID HURSTELL; and JAMES DIGBY,

Petitioners,

vs.

ROBERT G. PENDERGRASS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CITED AUTHORITIES

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LSA-R.S. 33:1321, *et seq.* 2

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Eleventh Amendment 1, 4

REASONS FOR DENYING THE WRIT

This Brief in Opposition in reply to the Petition for Writ of Certiorari presently pending before this Honorable Court in the captioned matter is intended to simply and succinctly state those reasons in support of denying the subject Writ. And, most importantly, this Brief shall also address certain perceived misstatements of fact which undersigned counsel believes were intended to substantiate the issues alleged to be before this Honorable Court.

The Greater New Orleans Expressway Commission, David Hurstell and James Digby, Petitioners herein, have presented two (2) questions for review in their Petition. Both questions implicitly assume facts which are, in fact, misstatements of fact, and without the inclusion of which would cause Petitioners to fail in their burden of showing cause to accept this Writ. First, Petitioners request this Honorable Court to consider whether Causeway Police Officers should be afforded those same immunities which are afforded to Louisiana state troopers, namely, Eleventh Amendment Immunity. Inclusive in their first question presented is the modifying phrase

> . . . in light of the fact that they are commissioned by the Louisiana State Troopers acting on behalf of the Louisiana State Troopers, and patrolling portions of Louisiana State Highway System?

From the foregoing, one may easily perceive that the Petitioners were, in fact, determined to be acting on behalf of the State of Louisiana. Petitioners follow-up this phraseology by asserting on page 10 of their Writ that

> . . . The sole purpose of their commission was to act on behalf of the State of Louisiana — in the

> stead of Louisiana State Troopers, to patrol the Causeway Bridge as part of the State Highway System. . . .

These asserted facts are simply untrue. A review of the Decisions of both the Federal District and Fifth Circuit Court of Appeals clearly reflect that Officers Hurstell and Digby were not acting on behalf of the State of Louisiana, but were acting on behalf of the Greater New Orleans Expressway Commission ("GNOEC") which was determined to be a separate and distinct legal entity apart from the State of Louisiana; that it was neither an arm nor an agency of the State.

Petitioners are well aware that the factual premise upon which their first question is styled was adjudged by both lower courts to their prejudice. In their original Brief submitted to the Fifth Circuit Court of Appeals, Petitioners present their first issue as:

> Whether the Trial Court erred in finding that GNOEC was not an arm of the State of Louisiana, controlled by the State of Louisiana and performing a State function.

The Fifth Circuit Court of Appeals determined that the Trial Court was not in error, and for good reason. Again, it is not the intention of undersigned counsel to assert as arguments the reasons provided by the lower courts in their respective Decisions. However, it is helpful to mention certain factors that appear to be prominent in the decision of this issue, and which Petitioners understandably avoided.

More particularly, the GNOEC was incorporated in 1954 pursuant to LSA-R.S. 33:1321, *et seq.* ("the Local Services Law"). These statutes fall within that part of Louisiana's

Revised Statutes designated "Municipalities and Parishes". Its Articles of Incorporation have not been amended and are in effect this date. Among the many provisions contained therein which characterize the GNOEC as a private entity is reference to its origin, namely, that it was created as ". . . a body corporate and politic, as an agency and instrumentality of the Parishes of Jefferson and St. Tammany . . .".

Petitioners further emphasize that that GNOEC police officers are commissioned by the Office of State Police and the Louisiana Department of Public Safety and Permits. This circumstance has no relationship whatsoever to the nature of the GNOEC. Although it is true that each Officer of the GNOEC must be commissioned by the Department of Public Safety, such a commission is not peculiar to the GNOEC. More specifically, there exists no other authority in the State of Louisiana to provide such a commission (*see* Deposition of Robert B. Sutherlin, Rec. 402-403). Further, the State Police can commission any legal entity which seeks such authority, whether state, parish or private (*see* Deposition of Robert B. Sutherlin, Rec. 402-403). The Department of Public Safety also issues the State's citizens' driver's license. Does that infer that each citizen is acting on behalf of the State of Louisiana when operating his/her vehicle? The GNOEC's Officers are commissioned by the State to perform functions which require a form of licensure, but for the purpose of acting on behalf of the GNOEC. It is also interesting to note that our State Police are "civil service", whereas the GNOEC Police is not (*see* Deposition of Robert B. Sutherlin, Rec. 402).

Petitioners also emphasize that the Causeway Bridge has been designated as a portion of the Louisiana State Highway System. Considering that GNOEC Officers patrol the bridge, they conclude that these Officers are performing a State function. The State does not own the Bridge. The GNOEC owns

this Bridge. The GNOEC simply provides Officers to patrol property which it owns.

Respondent respectfully refers this Honorable Court to both Decisions rendered by the District and Appellate Courts and which are attached to Petitioners' Writ. A review of these Decisions provide the specific factual details upon which Petitioners' original Motion for Summary Judgment was denied. Petitioners assert that this Honorable Court should accept their Writ because

> The Fifth Circuit's refusal to extend Eleventh Amendment immunity to police officers who act on behalf of the state or state agencies sharply conflicts with decisions of the United States Court of Appeals for the Seventh Circuit

(at p. 13 of Petitioners' Writ). However, and again, this assertion is based upon the factual premise that GNOEC Officers act on behalf of the State or a State agency. Said factual premise was determined to be incorrect. Therefore, there exists no conflict as Petitioners allege.

The second question which Petitioners desire that this Honorable Court review is very much interrelated to its first question as hereinabove discussed. More particularly, it is asserted that the GNOEC is an arm of the State of Louisiana and, as such, to be protected by the Eleventh Amendment immunity. Both Lower Court Decisions discuss in detail those six (6) factors which have been utilized in determining whether a legal entity is an agency or arm of the State. Respondent respectfully refers to its previous argument relating to Petitioners' first question, and further relies upon the respective discussions of each lower court in their respective Decisions.

However, Petitioners have focused on the *effect* a judgment against the GNOEC might have upon the State of Louisiana. Their argument is misdirected. The size of a judgment is of no moment in this case. The GNOEC's Articles of Incorporation provide it with the right to sue and be sued. The GNOEC has never required the joinder of the State in any claim filed against it in State or Federal Court, nor has the State ever filed any suit on behalf of the GNOEC (*see* Deposition of Hunter O. Wagner, Jr., Rec. 349). Quite the contrary, the GNOEC has always acted as a separate legal entity suing, and being sued, in its own name only (*see* Deposition of Hunter O. Wagner, Jr., Rec. 350). The GNOEC finances its operation and maintenance of the bridge with self-generated income via toll revenues and bond investment income. Bonds which have been issued by the GNOEC do not constitute debts of the State, and the State does not guaranty the payment of these Bonds. The only money which the GNOEC receives from the State of Louisiana is derived from State Highway Fund No. 2. Further, these monies cannot be used to finance the operation and maintenance of the Causeway.

Most importantly, the GNOEC treats any liabilities resulting from monetary claims as an operating expense, and which claims are either paid by its insurer or through a fund which it has established for this purpose. Said "Self-Insurance Retention Fund" is, in effect, excess coverage over and above what insurance may not pay. Simply stated, the GNOEC is a self-supporting entity. There exists no documents whatsoever which guarantees the payment of GNOEC's debt by the State of Louisiana. And, in fact, no such claim has ever been so paid. Consequently, Petitioners' attempt to illustrate a conflict between the Fifth Circuit and this Court in terms of the payment of judgments should fail.

CONCLUSION

Petitioners have attempted to convince this Honorable Court that there exists conflicts among the Federal Circuits allegedly created by this Fifth Circuit Decision. However, this assertion is based upon alleged facts which are unsupported and have proven to be untrue. Simply stated, the GNOEC is not an agency of the State, nor an arm thereof. It is a separate, clearly distinct legal entity. It owns the Causeway Bridge and employs police officers to patrol said Bridge. It maintains policies of insurance to pay liabilities of the nature which Respondent now claims. It has further established a Self-Insurance Retention Fund for excess coverage. This Fund is created by the GNOEC with its operating revenues and does not inure to the benefit of the State of Louisiana.

Consequently, and for those reasons as hereinabove set forth, it is respectfully submitted that there is no conflict between or among Circuits and this Court; that the Decision of the Fifth Circuit Court of Appeal is consistent with the six (6) tier test which has been utilized on many occasions in determining such an issue.

Respectfully submitted,

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